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No. 03-1648

IN THE

Supreme Court of the United States

ALBERT A. HANNA,

Petitioner,

v.

INFOTECH CONTRACT SERVICES, INC. and PFIZER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT PFIZER, INC.

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COUNTER-STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether this Court should grant certiorari to review the decision below in light of its holding in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), which decision concerned and impacted the standard to be applied in a mixed motive discrimination case, when: (a) the Petitioner failed to even raise the argument of mixed motive at any stage below; (b) there is no evidence of mixed motive, direct or otherwise; and (c) the lower Court's factual findings properly stated and followed the applicable rules of law, consistent with the reasoning and approach to discrimination cases based on Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*

PARTIES BELOW AND PARENT COMPANIES

The Petition states the names of the parties as they have been identified through this litigation. Pfizer, Inc. is a publicly traded company. There are no parent companies and no publicly held company which owns ten (10%) percent or more of its stock.

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BRIEF IN OPPOSITION FOR RESPONDENT PFIZER, INC.

Respondent, Pfizer, Inc. ("Pfizer"), respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was rendered on March 11, 2004, and was not published. It has been set forth by Petitioner as

Appendix A to his Petition[1]. The opinion of the United States District Court for the District of Connecticut was rendered on April 17, 2003 and entered on April 21, 2003. It has been published as *Hanna v. Infotech Contract Services, Inc., and Pfizer, Inc.*, 2003 U.S. Dist. LEXIS 7056, 91 FEP Cases (BNA) 1459 (D. Conn. Apr. 21, 2003), *aff'd*, 91 Fed. Appx. 737 (2d Cir. Mar. 11, 2004) and has been set forth by Petitioner as Appendix B to his Petition.

JURISDICTION

Jurisdiction in the first instance was conferred on the United States District Court for the District of Connecticut pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq*. That Court entered final judgment on April 21, 2003. The judgment of the United States Court of Appeals for the Second Circuit was entered on March 11, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Petition accurately sets forth the pertinent statutory provisions.

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1. The Second Circuit's opinion can also be located at 91 Fed. Appx. 737, 2004 U.S. App. LEXIS 4692, 93 FEP Cases (BNA) 554 (2d Cir. Mar. 11, 2004).

STATEMENT OF THE CASE

A. Factual Background

Albert A. Hanna ("Petitioner" or "Hanna") was formerly employed as a computer technician by Respondent InfoTech Contract Services Inc. ("InfoTech") to provide computer support services to Respondent Pfizer, Inc. ("Pfizer"). (P. App. p. 2, 6; J.A. pp. 9-10)[2] Petitioner sought relief from the United States District Court for the District of Connecticut. In his Complaint, Petitioner primarily alleged employment discrimination on the basis of national origin and ethnicity and gender, as well as retaliation and hostile environment, in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* ("Title VII") and § 46a-60, *et seq.* of the Connecticut General Statutes. Petitioner also brought various state common law claims which are not made the subject of the instant Petition. (P. App. A. pp. 2-3; J.A. pp. 6-7)

Petitioner's assignment was terminated by Pfizer on account of its receiving several complaints of sexual harassment from employees, bolstered by supporting statements of other employees interviewed during the investigatory process. (P. App. pp. 3-4, 9-19, Pfizer 2d Cir. Brief pp. 11-20) Petitioner does not dispute said complaints were received; however, Petitioner asserted essentially that Ms. Glenda Bryant, a non-supervisory administrative assistant at Pfizer, fabricated a sexual harassment complaint against Petitioner; incited Pfizer employees to fabricate other,

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2. References to Petitioner's Appendix are denoted as "P. App." References to the Record on Appeal, including the joint appendix and special appendix are denoted as "J.A." and "S.A." respectively.

even more egregious, sexual harassment allegations, which she then filtered to Pfizer management; and played a pivotal role in Petitioner's removal from the Pfizer account and ultimate termination of his employment by InfoTech. (Petition for Writ of Certiorari, p. 4; P. App. pp. 8, 17-18) It is significant that Petitioner has maintained that it was Bryant alone who harbored discriminatory intent based on his ethnicity and/or national origin. (Petition for Writ of Certiorari; P. App. pp. 3, 17-18)

Petitioner's sole, purported evidence of this alleged fabrication, conspiracy, and discriminatory bias, was a single conversation he allegedly had with Bryant concerning "terrorists" from the Middle East. (P. App. pp. 8, 17-18; Pfizer 2d Cir. Brief pp. 28-31) Conversely, Pfizer proffered undisputed facts that all actions taken by Pfizer were motivated solely by legitimate, non-discriminatory reasons and that, regardless of Petitioner's national origin or ethnicity or gender, his assignment with Pfizer was terminated based solely on the allegations of sexual harassment raised against him by Pfizer employees.[3] (P. App. pp. 3-4, 9-12, 16-18; Pfizer 2d Cir. Brief pp. 11-20)

The District Court granted both Respondents' Motions for Summary Judgment against Petitioner in a Ruling issued

3. Petitioner does not dispute that his employer was InfoTech, and thus maintained his Title VII based claims against Pfizer on the theory that Pfizer was a "joint employer". While Pfizer has consistently denied it was, at any time, a "joint employer", Pfizer nevertheless recognized that the determination of its status with respect to Petitioner could have presented a question of fact. *See Peltier v. Apple Health Care Inc.*, 130 F. Supp. 2d 285, 290 (D. Conn. 2000). Pfizer thereby maintains this issue need not be determined by the Court for purposes of ruling on the Petition.

on April 17, 2003, and entered on April 21, 2003, holding that "[a] reasonable jury could not conclude on the basis of statements allegedly made only by a single, non-supervisory employee, that Pfizer was motivated by prejudice." (P. App. p. 18) More specifically, Judge Underhill properly found that although a question of fact existed as to whether Petitioner established a prima facie case of discrimination, Pfizer had nevertheless articulated a legitimate non-discriminatory reason for Petitioner's removal by "establishing that Petitioner was terminated as a result of multiple allegations that he harassed female employees of Pfizer." (P. App. pp. 16-18) The lower Court further ruled that Petitioner had failed to sustain his burden of proving the articulated reason for Pfizer's decisions was pretext for discrimination. The District Court, in so ruling, applied the standard test and process of shifting burdens set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). (P. App. pp. 14-18)

In ruling that Petitioner could not proffer sufficient evidence to sustain his burden that discrimination was the real motivation for his termination, the District Court drew attention to Petitioner's implausible theory of discrimination; namely, that "a non-supervisory employee hatched a conspiracy to fabricate sexual harassment claims against him because of his ethnic background or national origin." (P. App. pp. 17-18) The District Court recognized that the only evidence of bias, prejudice or racism was Petitioner's unsupported allegation that, during a single conversation he had with Bryant in the summer of 1999, she made prejudicial comments about Arabic people. Yet, as the District Court recognized, even if this one conversation occurred as Petitioner alleged, this one event could not be deemed sufficient evidence to permit a reasonable jury to find that

Petitioner was removed from Pfizer's account by the ultimate decision makers[4] because of his national origin or ethnicity. (P. App. pp. 17-18)

Petitioner never asserted in the Complaint, nor in his opposition to the Motion for Summary Judgment, that his termination was the result of a mixed motive on the part of Pfizer; indeed, to the contrary, throughout the proceedings below, Petitioner proffered only one theory; i.e., that the employees who complained, and the employees who investigated those complaints, were induced by Bryant to fabricate the complaints, and that Bryant was solely motivated by his national origin and ethnicity. (P. App. pp. 17-18; J.A. pp. 9-22)

Petitioner appealed the ruling of the District Court. Included in his argument on appeal was the assertion that the ruling in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), required the Second Circuit Court to remand the matter to the United States District Court. (Hanna 2d Cir. Brief; Pfizer 2d Cir. Brief pp. 58-59) After the submission of briefs by all parties, and oral argument before the Second Circuit Court of Appeals on March 1, 2004, that Court ruled: "We have considered all of appellant's claims and find them meritless." Accordingly, the ruling below was affirmed in all respects. (P. App. pp. 1-4)

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4. The District Court ruled as well that Petitioner failed to sustain his burden of proof that he was the target of discrimination on account of his gender, or retaliated against for complaining to a supervisor about the alleged conversation with Bryant. It was also concluded that Petitioner could not prove that he had been subjected to a hostile work environment. (P. App. pp. 18-19) However, Petitioner did not pursue the dismissal of these claims in the Appeal to the Second Circuit Court.

B. Procedural Background

Respondents filed their Motions for Summary Judgment in the United States District Court for the District of Connecticut on July 22, 2002. The District Court granted both Motions on April 17, 2003, and entered those rulings on April 21, 2003. (P. App. pp. 5-17) Petitioner appealed those rulings to the Court of the Appeals for the Second Circuit on May 14, 2003. A decision affirming the District Court's ruling was entered by the Court of Appeals for the Second Circuit on March 11, 2003. (P. App. pp. 1-4) Petitioner filed this Petition which was docketed by this Court on June 14, 2004.

REASONS FOR DENYING THE PETITION

A. Petitioner's Assertions Regarding this Court's Decision in *Desert Palace* Do Not Warrant the Grant of Certiorari In This Case.

i. Petitioner Did Not Raise a Mixed Motive Argument With the District Court

Petitioner has brought to this Court his simple disagreement on the facts presented and a novel insistence that the lower Court should have considered arguments not even presented below. Specifically, in an attempt to avoid the proper conclusion reached by the District Court regarding the absence of evidence that Pfizer's reasons were pretextual, and that "no reasonable jury could find that the sexual harassment claims were a pretext for having Petitioner removed", Petitioner, for the first time on appeal to the Second Circuit, asked that Court to apply the mixed-motive

analysis set forth in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), having argued previously only the application of the *McDonnell Douglas* test. The District Court had absolutely no reason to address the mixed-motive test as altered by the Supreme Court's holding in *Desert Palace*, which did not, as Petitioner infers, create the mixed-motive theory for the first time, but simply clarified that presentation of direct evidence is not required where a plaintiff asserts a mixed-motive situation. (P. App. pp. 5-25)

For this reason alone, this Petition should be denied. Indeed, the Second Circuit Court has consistently held that arguments not raised in the lower court proceedings are forfeited, and cannot be raised for the first time on appeal. *See, e.g., Zerilli-Edelglass v. New York City Transit Authority*, 333 F.3d 74, 80 (2d Cir. 2003) (citing *United States v. Angell*, 292 F.3d 333, 337 (2d Cir. 2002) and *Singleton v. Wulff*, 428 U.S. 106, 120 (1976)); *Ghose v. Century 21, Inc.*, 12 Fed. Appx. 52, 55 (2d Cir. 2001) (citing *Singleton*, 428 U.S. at 120 and *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994)); *Baldwin v. United States Army*, 223 F.3d 100, 102 (2d Cir. 2000) (likewise citing to *Singleton*, 428 U.S. at 120, and *Greene*, 13 F.3d at 586).

The sole exception to this generally applied principle is where the Court deems an "obvious injustice" will result. *Mahant v. Lehman Brothers*, 32 Fed. Appx. 598 (2d Cir. 2002). However, even in *Mahant*, the Court recognized that appellant had been represented by counsel before the District Court and had a full and fair opportunity to raise the argument he was attempting to raise the first time on appeal. Consequently, the Court held that no "obvious injustice" had been established. *Id.* at 599 (citing *Singleton*, 428 U.S. at 120-21; and *Greene*, 13 F.3d at 586).

Likewise here, Petitioner was represented by counsel throughout all proceedings below. He had every opportunity to argue that Pfizer was persuaded by a "mixed motive" to request the termination of his Infotech assignment; however, Petitioner opted to focus solely on a conspiracy theory of discrimination, purportedly facilitated and spearheaded by one, non-supervisory employee, Glenda Bryant, with whom he had an alleged conversation about "terrorists". (Memorandum of Law in Opposition to Motion for Summary Judgment, pp. 8, 23-24; P. App. pp. 5-25) Moreover, in any event, the Court of Appeals had the discretion to entertain the argument for the first time at the appeal stage, and either rejected the opportunity to do so, or entertained the argument and determined the Petitioner's claims nevertheless failed. *See Furman v. United States*, 720 F.2d 263, 265-66 (2d Cir. 1983) (where a summary order, such as that order entered hereinbelow, is issued, there is no presumption that less than adequate consideration had been given to all claims raised in the appeal). The judgment entered by the Second Circuit clearly provided that all of the Petitioner's claims had been considered. (P. App. p. 4) Consequently, Petitioner has not established the proper basis for exercise of this Court's certiorari jurisdiction based on the *Desert Palace* ruling.

ii. Even if Desert Palace Should Have Been Applied, Certiorari Is Not Warranted

In the alternative, even if the holding of *Desert Palace* had been applied, a mixed-motive analysis would not have salvaged Petitioner's claims. Specifically, it was recognized that Petitioner was unable to establish by a preponderance of the evidence that a protected characteristic played *any* role whatsoever in Pfizer's decision making, not to mention whether this characteristic was a motivating factor.

Noteworthy on this point, the entire Petition rests on blatant mischaracterizations of the record below. Specifically, Petitioner claims that Bryant professed to have been "deputized" by management to investigate the Petitioner "in a supervisory capacity". (Petition for Writ of Certiorari at 3) This quote is represented to have been taken from Bryant's deposition testimony. However, what Bryant actually stated was as follows: "My boss asked me to talk to any of the ladies that might have had a problem with Albert, to see if they were all right. Since there are no female supervisors, he was putting me in *supervisory capacity so to speak as a woman to make sure that they were all right* and to give them moral support; that Pfizer would not tolerate unwarranted actions by anybody." (Bryant Depo. pp. 50-51, as J.A. p. 412 in record on appeal) (emphasis added). Moreover, the notion of being "deputized" does not appear. Clearly then, Bryant never suggested she was placed into any supervisory position to conduct an investigation or to make any decisions. The Courts below clearly considered this actual testimony, and not that version crafted by Petitioner. In any event, this dispute with the Second Circuit Court's factual determination on this point is unsuitable for resolution by the exercise of certiorari jurisdiction.[5]

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5. Petitioner similarly distorts his own testimony concerning the conversation he had with Bryant, purportedly regarding "Arabs". Contrary to the version presented in the Petition, and to the Court below, his actual deposition testimony confirmed that Bryant never impugned *all* Arabic people as he now disingenuously alleges before the Second Circuit Court, but reflected an opinion regarding "terrorists" from that part of the world. (Pfizer 2d Cir. Brief pp. 28-30, citing Hanna deposition pp. 79-81, located in the record on appeal at J.A. pp. 85-87) Here again, however, certiorari should not be used to resolve Petitioner's disagreement with the factual findings of the courts below.

In short, the lower Courts properly concluded Petitioner had not, and could not, demonstrate any nexus between Bryant's alleged discriminatory statements or bias, and the complaints of Pfizer employees against Petitioner. Nor was any evidence presented to connect alleged discriminatory statements by Bryant, a non-supervisory employee, to alleged discrimination by Pfizer when it decided to request the removal of Petitioner from its InfoTech account.[6] Petitioner's mixed-motive analysis thus would have failed for the same reasons his discrimination claim failed; his inability to proffer sufficient evidence of any link between Bryant's purported bias and Pfizer actions. It bears repeating, then, that Petitioner has only presented his disagreement with factual findings of the lower Courts; *i.e.*, an assertion for the correction of factual

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6. More specifically, as the lower courts recognized, there was no evidence whatsoever to support Hanna's assertion that Bryant had a significant role in his discharge. There was no evidence that she fabricated her own complaint. There was no evidence that she improperly influenced or misled decision makers. There was no evidence that she invented or embellished complaints of others against Hanna. (P. App. pp. 3-25; Pfizer 2d Cir. Brief pp. 11-20, 33-36, 52-55) Critically important, contrary to the distortions of the record portrayed in Hanna's appeal, there was no evidence that decision makers had any reason to suspect fabrications by any employee whom they interviewed. (*Id.*) On the contrary, the uncontraverted evidence was clear that Pfizer employees had concerns regarding Hanna's conduct towards them, and that management and human resource personnel conducted a proper investigation. The fact that Bryant conferred with the other Pfizer employees, two of whom had already lodged their complaints, is irrelevant. There was no support for Hanna's blatantly misleading and conclusory statement that "Bryant's key role in Hanna's discharge was the amplified product of the bigoted words she used with him"; on the contrary, the only evidence was that Bryant was merely *one* of several women whose statements the Pfizer decision makers considered before requesting that Hanna be removed from its Infotech account. (*Id.*)

error, and not a "principal purpose" for this Court's exercise of its certiorari jurisdiction, warranting denial of the Petition. *Braxton v. United States*, 500 U.S. 344, 347 (1991). *See also Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring) (the Court's "certiorari jurisdiction is designed to serve broader purposes than the correction of error in particular cases").

B. The Decisions Below Are Consistent With Those of Other Circuits

While Petitioner casually asserts the ruling in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998) was "ignored" by the Appellate Court, he does not provide any support for this assertion. Specifically, Petitioner argues that Bryant should have been deemed a "supervisor" under a *Burlington* analysis. (Petition for Writ of Certiorari p. 4) However, Petitioner misstates the rulings below; contrary to his suggestions here, the District Court noted *three* primary bases for its decision that Petitioner was unable to establish pretext for discrimination, only one of which was a finding that evidence was lacking to establish Bryant was a supervisor. (P. App. pp. 14-19) The District Court also determined there to be a lack of evidence to demonstrate the existence of a conspiracy hatched by Bryant based on Petitioner's ethnicity, or that the key decision makers knew, at the time they made the subject decision, of such a conspiracy. (P. App. pp. 9-18) Bluntly stated, Petitioner's argument that the lower Court erred in not considering Bryant a "supervisor" blatantly misrepresents the record below; more accurate is that the lower Court already addressed the alternative scenario; i.e., even if Bryant was somehow viewed as having acted in a supervisory capacity, Petitioner still failed to bridge the significant gap between Bryant's alleged comments to Petitioner and the

action of the Pfizer decision makers. (P. App. pp. 17-18) Petitioner simply defied the record evidence, alleging: "she acted with such powers when she interviewed witnesses and functioned as the filter through which alleged complaints passed to Foster," in addition to misapplying case law such as the decision in *Burlington*.

Petitioner thereby fails to address the totality of the rationale of the lower Courts, or to establish why, even if there was error in their findings regarding Bryant's status, that the ultimate holding would have been different in view of the persuasive power of the remaining bases. Petitioner's attempt to suggest a "disagreement" with binding judicial precedent is thereby disingenuous, and Petitioner's similar effort to manufacture a conflict among the circuits or with other decisions below, merely by claiming that *Burlington* was "ignored", masks an agenda that he knows renders this case unworthy of review. In reality, his arguments rely on the premise that the Courts below erred as a matter of fact in reviewing the evidence. As a decision on the issue here will not change the outcome of the Petitioner's case without such a fact-specific inquiry, review should be denied. *United States v. Johnson*, 268 U.S. 220 (1925) ("This Court, however, do[es] not grant certiorari to review evidence and discuss specific facts."); *Vasquez v. United States*, 454 U.S. 975, 977 (1981) (Stevens, J., regarding denial of cert.) (Court should "decline to review a decision that turns on details of the evidence that are not likely to be duplicated in other cases."); *accord Kyles v. Whitley*, 514 U.S. 419, 456 (1995) (Scalia, J., dissenting). *See also Somerville v. United States*, 376 U.S. 909 (1964); *The Monrosa v. Carbon Black, Inc.*, 359 U.S. 180 (1959). Bluntly stated, the instant ruling is patently consistent with decisions below, simply applying the *McDonnell Douglas* analysis, and no novel rationale was

necessary for the District Court to reach its conclusion after application of the *McDonnell Douglas* test. (P. App. pp. 2-4, 14-19)

C. The Petition Does Not Present An Important Issue

Petitioner, for those same reasons explored in detail above, has failed to establish the existence of any constitutional or otherwise sufficiently important issue to warrant the grant of certiorari here. First, as demonstrated, he fails to explain why the mixed motive concept was never argued before the District Court, and thus, why *Desert Palace* should even be addressed. As previously noted, the *Desert Palace* Court did not introduce a novel concept; *i.e.*, it did not *create* the mixed-motive theory of liability, but simply clarified that direct evidence was not required to establish such mixed motive. Thus, any suggestion by Petitioner that he lacked the ability to argue this concept before the District Court should be rejected. Second, and also as demonstrated, he has nevertheless failed to establish that the application of *Desert Palace* would have made a difference in the outcome below. Third, he has failed to present anything other than a request for a correction of an alleged error in fact finding, which itself warrants denial of his Petition. *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271 (1949). In short, the Petition merely presents objections to the decision below, none of which are appropriate for this Court's review or resolution on this record. Petitioner simply disagrees with the Court of Appeal's application of this Court's precedent to the facts of his case. Such a disagreement is certainly not tantamount to constituting or presenting a conflict between a decision of any Circuit Court and any ruling of this Court, or otherwise of posing a significant issue for resolution.

CONCLUSION

For the foregoing reasons, Respondent Pfizer, Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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